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SUPREME COURT, U.S.

No. 73-1395

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals rendered no opinion in dismissing the appeal. The opinion of the court of appeals on petition for rehearing (App. B, *infra*, pp. 3a–9a) is not yet reported. The memorandum and order of the district court (App. D, *infra*, pp. 11a–15a) are reported at 357 F. Supp. 619.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, p. 1a), was entered on September 21, 1973. A timely petition for rehearing was denied on January

15, 1974 (App. B, *infra*, pp. 3a–9a). By order of February 6, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including March 16, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy clause bars the United States from appealing to the court of appeals from an order of the district court, dismissing an indictment on the ground of unnecessary pre-indictment delay, which was entered after a jury returned a guilty verdict.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731, as amended, 84 Stat. 1890, provides in pertinent part:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> * * * * *
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. In an indictment returned on October 28, 1971, in the United States District Court for the Eastern District of Pennsylvania, respondent George J. Wilson, Jr., was charged with having embezzled funds of a labor organization, in violation of 29 U.S.C. 501(c). The indictment alleged that respondent, business manager of International Brotherhood of Electrical Workers, Local 367, had converted funds belonging to the union in the form of a check issued by two officers of the local, Robert Schaefer and Robert L. Brinker. It was charged that the check had been issued for the purpose of paying the cost of a wedding reception for respondent's daughter (App. B, *infra*, p. 4a).

Respondent filed a motion to dismiss the indictment for delay in the institution of the prosecution; at two pre-trial hearings, he established that Schaefer and Brinker, the signatories to the check in issue, were no longer available to testify, due to Brinker's death and Schaefer's terminal illness. The motion to dismiss was denied, and respondent was tried and found guilty by a jury (App. B, *infra*, p. 5a).

On April 18, 1973, after the verdict of guilty was returned, the district court entered an order dismissing the indictment because of unnecessary pre-indictment delay which allegedly prejudiced respondent's right to a fair trial (App. D, *infra*, pp. 11a–15a). The district court made no effort to reconcile this order with its pre-trial order, entered after a hearing, which denied the identical motion to dismiss, although it did base its finding of prejudice on evidence heard at both the pre-trial hearing and the trial (App. D,

infra, pp. 14a–15a).

The United States filed a notice of appeal pursuant to the Criminal Appeals Act, 18 U.S.C. 3731, which authorizes an appeal to the court of appeals from an order of the district court dismissing an indictment "except * * * where the double jeopardy clause of the United States Constitution prohibits further prosecution." On September 21, 1974, the court of appeals, relying upon *United States* v. *Sisson*, 399 U.S. 267, held that "the district court's order was not appealable by the government under 18 U.S.C. 3731" and entered a "Judgment Order" dismissing the indictment (App. A, *infra*, p. 1a).

On the assumption that the court of appeals was relying on that portion of *Sisson* which construed the old Criminal Appeals Act "as confining the Government's right to appeal—except for motions in arrest of judgment—to situations in which a jury has not been impaneled" (399 U.S. 302–303), a petition for rehearing or rehearing *en banc* was filed, since it was plain from the legislative history that Congress intended to overrule *Sisson* when it amended the Criminal Appeals Act (18 U.S.C. 3731) to permit appeals from a dismissal of indictment except where the Double Jeopardy Clause prohibits further prosecution. Moreover, on the authority of cases such as *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911, which held that it was improper for a district court judge to grant a post-trial motion to dismiss an indictment on the same grounds examined and rejected prior to trial, and that mandamus was available to set aside

such a dismissal, a petition for a writ of mandamus was filed as an alternative to a petition for rehearing.

On January 15, 1974, the court of appeals denied the motion for rehearing in a six page opinion (App. B, *infra*, pp. 3a–9a).[1] Rather than relying on a construction of Section 3731, the court of appeals held that the post-conviction dismissal for unnecessary delay in prosecution was an acquittal and that further appellate review was barred by the Double Jeopardy Clause.

The court of appeals held that regardless of label "the trial judge's disposition is an 'acquittal' if it is a legal determination on the basis of facts adduced at the trial relating to the general issue of the case" (App. B, *infra*, pp. 3a–9a). Although the basis of the dismissal had nothing directly to do with the general issue in the case (the defendant's guilt or innocence), the court of appeals held that, since the facts relied on also were relevant to a determination of the general issue, the dismissal was in fact an acquittal (App. B, *infra*, p. 6a):

> While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination,

[1] The petition for rehearing *en banc* was denied with one judge dissenting (App. C, *infra*, p. 10a). The court of appeals also denied the application for a writ of mandamus (App. C, *infra*, p. 10a).

> relied on facts adduced at trial relating to the general issue of the case.

Having concluded that the order was an "acquittal", the court of appeals, relying on *United States* v. *Sisson,* 399 U.S. 267, held that appellate review was barred even though the only relief sought was an order vacating the dismissal and directing the entry of a judgment of conviction (App. B, *infra,* p. 6a):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States* v. *Ball,* 163 U.S. 662, 671 (1896).

REASONS FOR GRANTING THE WRIT

The Criminal Appeals Act, as amended by the Omnibus Crime Control and Safe Streets Act of 1970, was expressly intended to authorize an appeal from an order of the district court terminating a criminal prosecution in all cases in which an appeal would not violate the Double Jeopardy Clause. The Act, as the court of appeals held, "establishe[s] the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information" (App. B, *infra,* p. 6a).[2]

[2] Since the Court of Appeals for the Third Circuit, consistent with other courts of appeals, has construed the Criminal Appeals Act to permit appeals in all cases in which the Constitution permits, we are treating the issue raised here solely in terms of the Double Jeopardy Clause.

The cases broadly construing the Criminal Appeals Act to

The holding of the court of appeals (1) that a post-conviction order dismissing an indictment, which was not based on the sufficiency of the evidence, is an acquittal and (2) that the Double Jeopardy Clause bars an appeal from such an acquittal even where a successful appeal would not result in a retrial, but merely the entry of a judgment of conviction in accordance with the verdict of the jury, marks a substantial departure from prior holdings of this Court and other courts of appeals, and raises a substantial issue regarding the meaning of the Double Jeopardy Clause. Since the issue involves a conflict among the courts of appeals over their appellate jurisdiction, it is particularly appropriate for review. "Otherwise the courts

encompass all orders terminating a criminal prosecution (except when barred by the Double Jeopardy Clause), including acquittals and orders in arrest of judgment. include *United States* v. *Jenkins*, No. 73-1572, (C.A. 2), decided December 11, 1973, where Judge Friendly wrote (Slip op. 700):

"* * * Congress intended to extend the Government's right of appeal in criminal cases as far as it constitutionally could. If the language left any doubts on that score, they would be set to rest by the report of the Senate Committee on the Judiciary, 91st Congress, No. 91-1296, at 4-13. The appeal will therefore lie unless the Double Jeopardy clause prevents interference with appeallant's acquittal * * *."

Accord: *United States* v. *Serfass*, No. 73-1736 (C.A. 3), decided February 20, 1974; *United States* v. *Martin Linen Supply Co.*, 485 F. 2d 1143 (C.A. 5), certiorari denied, No. 73-743, February 19, 1974; *United States* v. *Esposito*, No. 72-1825 (C.A. 7), decided June 12, 1973, certiorari denied, No. 73-432, January 7, 1974; *United States* v. *Brown*, 481 F. 2d 1035. Cf. *United States* v. *Southern Railway Co.*, 485 F. 2d 309 (C.A. 4); *United States* v. *Rothfelder*, 474 F. 2d 606 (C.A. 6), certiorari denied, 413 U.S. 922. (These cases however, are in conflict with regard to the scope of the Double Jeopardy Clause in various contexts).

and the parties must [continue to] expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *United States* v. *Sisson*, 399 U.S. 267, 307.

1. There is a conflict among the courts of appeals regarding the appealability of a post-conviction order dismissing an indictment. In *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2), appeal dismissed, 336 U.S. 934, the Court of Appeals for the Second Circuit held that an appeal from a post-conviction order of the district court, which dismissed an indictment under the statute of limitations, was not barred by the Double Jeopardy Clause. Speaking for the court, Judge Learned Hand wrote (172 F. 2d at 743):

> * * * [T]he question becomes whether to reverse the dismissal and enter a judgment of conviction upon the verdict would violate the defendant's constitutional privilege. Had the trial judge directed a verdict, so that it would have been necessary upon reversal to subject the defendant to trial before a second jury, that would be "double jeopardy," but, although the Constitution gives an accused person the benefit of any mistakes in his favor of the first jury he encounters, whether it has passed upon his guilt or not, it does not extend that privilege to mistakes in his favor by judges. Indeed, were the opposite true, all appeals from decisions in arrest of judgment would be constitutionally futile because no judgment of conviction could be entered when they were reversed. So long as the verdict of guilty remains as a datum, the correction of errors of law in attaching the proper legal consequences to it do not trench upon the constitutional prohibition.[3]

The Court of Appeals for the Second Circuit has continued to adhere to this view. In *United States* v. *Weinstein*, 452 F. 2d 704, certiorari denied, *sub nom. Grunberger* v. *United States*, 406 U.S. 917, the district court entered a post conviction order dismissing an indictment in the "interests of justice". In holding that the Double Jeopardy Clause did not preclude appellate review, even though the dismissal was based on evidence heard at the trial which went to the general issue in the case, the court of appeals held that "[t]he issuance of the writ [of mandamus] in this proceeding will not subject [the defendant] to retrial in violation of his right to be protected against double jeopardy" (452 F. 2d 712–713).[4] Moreover, in rejecting the claim that the order of the district court should be treated as an acquittal, the court stated (452 F. 2d 714):

> [D]efendant's reliance on the *Sisson* holding that an appellate court will look at what a district court did rather than at what it said it was doing, 399 U.S. at 270, 90 S.Ct. 2117, 26 L.Ed.2d 608, is misplaced. What the judge did in *Sisson* was entirely plain. He refused to

[3] In *United States* v. *Zisblatt*, *supra*, the court of appeals, after holding that the Double Jeopardy Clause did not bar an appeal, certified the appeal to this Court. The appeal was dismissed on motion of the Solicitor General solely because it was his view that the old Criminal Appeals Act did not authorize an appeal. See *United States* v. *Sisson*, 399 U.S. at 306.

[4] The indictment in *United States* v. *Weinstein*, *supra*, predated the 1970 amendments to the Criminal Appeals Act. Under the old Act the order was not appealable, and so the United States sought a writ of mandamus.

> enter judgment on a verdict because, in his view, the Constitution prohibited him from doing so. This was, in truth and fact, a judgment of acquittal; the judge believed that, with the evidence taken in the light most favorable to the Government, it still would not support a conviction. The Supreme Court held that such a judgment of acquittal could not be transformed into the rather technical concept of an arrest of judgment, to wit, "the act of a trial judge refusing to enter judgment on the verdict because of an error appearing on the face of the record," 399 U.S. at 280, 90 S.Ct. at 2125, simply by his calling it such. It would be a far cry from this to hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter, could not rightly have entered and, in all probability, had lost the power to enter. [See, also, *United States* v. *Dooling*, 406 F. 2d 192 (C.A. 2), certiorari denied *sub nom. Persico* v. *United States*, 395 U.S. 911] [5]

Similarly, in *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8), the Court of Appeals for the Eighth Circuit, citing the holdings of the Second Circuit, entertained jurisdiction of an appeal in circumstances virtually identical to the instant case.[6]

[5] In *United States* v. *Jenkins*, No. 73-1572 (C.A. 2), decided December 11, 1973, the district court, after a non-jury trial, dismissed an indictment on the merits, based on its evaluation of the undisputed facts in light of the applicable law. The court of appeals held that, unlike *United States* v. *Weinstein*, *supra*, this was an acquittal and that an appeal was barred by the Double Jeopardy Clause.

[6] In *United States* v. *Whitted*, *supra*, the district court, based in part on evidence heard at the trial (454 F. 2d at 643), dismissed the indictment on the ground that it could not be sure whether the indictment against the defendant was returned on the basis of the evidence before the grand jury or on the basis of possible bias and prejudice against him (such a claim had been rejected prior to trial). The court of appeals, nevertheless, entertained the appeal and reversed the post conviction order of the district court. Although the opinion did not expressly discuss the double jeopardy issue, its reliance upon *Dooling* and *Weinstein*, which did discuss the issue, seems to indicate its acceptance of the holding in those cases on the availability of appellate review. See, also, *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8).

The holding of the court of appeals here, characterizing the order of the district court, which was not based on a determination of the sufficiency of the evidence, as an acquittal from which an appeal is barred by the Double Jeopardy Clause, cannot be reconciled with the holdings of the Court of Appeals for the Second Circuit in *United States* v. *Weinstein*, *supra*, and Court of Appeals for the Eighth Circuit in *United States* v. *Whitted*, *supra*. The conflict should be resolved by this Court.

2. The Court of Appeals for the Third Circuit also misconstrued the opinion of this Court in *United States* v. *Sisson*, 399 U.S. 267. *Sisson* lends no support to the label of acquittal which the court of appeals attached to the order of the district court.

In *Sisson*, where the offense was a refusal to submit to induction into the armed services, the defendant claimed before trial that he was a conscientious objector to military service in Vietnam. At trial, Sisson based his defense principally upon his contention that American participation in the conflict was illegal, but presented evidence in support of his conscientious objection claim as well. After a guilty verdict, the dis-

trict court granted what it termed a motion in arrest of judgment, holding that the Free Exercise Clause of the First Amendment prohibited Sisson's conviction for refusal to submit to induction. The judge recited the facts of the case and explained that Sisson's testimony and demeanor as a witness gave support to his claim of conscientious objection to service in Vietnam.

This Court held that an appeal from the order of the district court was barred by the Criminal Appeals Act then in effect (399 U.S. at 288–289):

> The same reason underlying our conclusion that this was not a decision arresting judgment—*i.e.*, that the disposition is bottomed on factual conclusions not found in the indictment but instead made on the basis of evidence adduced at the trial—convinces us that the decision was in fact an acquittal rendered by the trial court after the jury's verdict of guilty.

In explaining why the order was equivalent to a judgment of acquittal pursuant to Fed.R.Crim.P., Rule 29, the Court wrote (399 U.S. at 289–290):

> For the purposes of analysis it is helpful to compare this case to one in which a jury was instructed as follows [and returned a not guilty verdict]:
>
> "If you find defendant Sisson to be sincere, and if you find that he was as genuinely and profoundly governed by conscience as a martyr obedient to an orthodox religion, you must acquit him because the government's interest in having him serve in Vietnam is outweighed by his interest in obeying the dictates of his conscience. On the other hand, if you do not so find, you must convict if you find that petitioner did wilfully refuse induction."
>
> * * * * *
>
> There are three differences between the hypothetical case just suggested and the case at hand. First, in this case it was the judge—not the jury—who made the factual determinations. This difference alone does not support a legal distinction, however, for judges, like juries, can acquit defendants, see Fed. Rule Crim. Proc. 29. Second, the judge in this case made his decision *after* the jury had brought in a verdict of guilty. Rules 29(b) and (c) of the Federal Rules of Criminal Procedure, however, expressly allow a federal judge to acquit a criminal defendant after the jury "returns a verdict of guilty." And third, in this case the District Judge labeled his post-verdict opinion an arrest of judgment, not an acquittal. This characterization alone, however, neither confers jurisdiction on this Court, see n. 7, *supra,* nor makes the opinion any less dependent upon evidence adduced at the trial. In short, we see no distinction between what the court below did, and a post-verdict directed acquittal.

Of course, a district court may grant judgment of acquittal pursuant to Fed.R.Crim.P., Rule 29, only "if the evidence is insufficient to sustain a conviction." And it was for this reason that the Court observed that "what the District Court did in this case cannot be distinguished from a post-verdict acquittal entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense] that Sisson was insincere" (399 U.S. at 299).

In the present case, the district court's order bears

no resemblance to a judgment of acquittal under Rule 29. The order does not turn on a finding that the evidence was insufficient. To the contrary, implicit in the holding of the district court is the finding that the evidence was sufficient; the indictment was dismissed because of an unnecessary delay which may have prejudiced the defendant's ability to rebut or explain that evidence. As in *United States* v. *Marion*, 404 U.S. 307, 312, which involved a pretrial order identical to that at issue here, "[t]he motion to dismiss rested on grounds that had nothing to do with guilt or innocence or the truth of the allegations in the indictment."

3. Even assuming that the order of the district court could properly be characterized as an acquittal, an appeal would not be barred by the Double Jeopardy Clause. Whatever may be the rule where the finder of fact (the jury or the judge trying the case without a jury) acquits, there is no basis for holding that the Double Jeopardy Clause bars an appeal where, in Judge Learned Hand's phrase, "the verdict of guilty remains as a datum" and where all that is at issue is "the correction of error of law in attaching the proper legal consequences to it" (172 F. 2d at 743).

We do not regard the issue as having been foreclosed by *United States* v. *Sisson, supra*. There, after holding that the order was an acquittal for the purpose of the old Criminal Appeals Act, and, therefore, that the Court was without jurisdiction to entertain the

appeal,[7] the Court added the following dictum (399 U.S. at 289–290):

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution * * *. [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense," *United States* v. *Ball*, 163 U.S. 662, 671 (1896).

This dictum, however, had little relevance to the case before the Court, since the United States was not seeking "a subsequent prosecution" of *Sisson* but merely to have the district court enter a judgment of conviction in accordance with the jury's verdict. The single case cited by the Court, *United States* v. *Ball*, 163 U.S. 662, unlike *Sisson*, was a case in which "the verdict of the jury, after a trial upon the issue of guilty or not guilty, acquitted Millard F. Ball of the whole charge" (162 U.S. 670); it was held there that the verdict "could not be reviewed, on error or otherwise, without putting him twice in jeopardy" because "a verdict of acquittal * * * is a bar to a subsequent prosecution for the same offence" (162 U.S. 671). See, also, *United States* v. *Kepner*, 195 U.S. 100, where the defendant had been tried in the Philippines without a jury and acquitted by the trial judge. Under Philippine law an appeal was authorized from such

[7] As we have already argued, *Sisson* is readily distinguishable on facts: in that case, a judgment of acquittal on the merits was entered; here the dismissal had nothing to do with guilt or innocence.

an acquittal, and the appellate court apparently had authority to make *de novo* findings of fact on appeal. Citing *United States* v. *Ball, supra,* the Court held that such an appeal is barred by the Double Jeopardy Clause (195 U.S. at 133):

> The *Ball* case, 163 U.S., *supra,* establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. *The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense,* * * * [emphasis added].

These cases, together with *Fong Foo* v. *United States,* 369 U.S. 141, which involved a verdict of acquittal entered before a jury verdict,[8] are all distinguishable from a case such as this, in which a jury has convicted the defendant and a district court judge has improperly attempted to deprive the United States of "the rightful fruits of a valid conviction". *Will* v. *United States,* 389 U.S. 90, 97–98.

Accordingly, the language of *Sisson,* which was

[8] The relief sought there would have required "that the petitioners be tried again for the same offense." *Fong Foo* v. *United States,* 369 U.S. 141, 143. Cf. *Illinois* v. *Sommerville,* 410 U.S. 458.

mistakenly relied upon by the court of appeals, and which "was unnecessary to th[is] Court's decision" should not "be considered as binding authority," *Kastigar* v. *United States,* 406 U.S. 441, 455.[9] The issue whether this dictum should be regarded as an authoritative construction of the Double Jeopardy Clause is a substantial one warranting review by this Court.

[9] Tending to confirm our submission that *Sisson* should not be regarded as dispositive of the double jeopardy issue is the plurity opinion in *United States* v. *Jorn,* 400 U.S. 470. As there stated in discussing *Sisson* (400 U.S. at 478, n. 7):

"It is clear from the record in this case that Judge Ritter's action cannot, as two members of the Court suggest, be classified as an 'acquittal' for purposes of this Court's jurisdiction over the appeal under 18 U.S.C. § 3731.

* * * * * * *

"Of course, as we noted in *Sisson, supra,* at 290, the trial judge's characterization of his own action cannot control the classification of the action for purposes of our appellate jurisdiction. But *Sisson* goes on to articulate the criterion of an 'acquittal' for purposes of assessing our jurisdiction to review: the trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case . . .'"

This language indicates that four members of the Court viewed the holding in *Sisson* solely as one determining "this Court's jurisdiction over the appeal under [the old] 18 U.S.C. 3731." See, also, the dissenting opinion of Mr. Justice White in *United States* v. *Sisson, supra,* 399 U.S. 328, n. 4 (which was joined by the Chief Justice and Mr. Justice Douglas): "I cannot believe that the majority really means to suggest that Congress could not constitutionally authorize an appeal in a case precisely parallel to this one in accordance with currently sought legislation [the present Section 3731] * * *."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.
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Assistant Attorney General.
EDWARD R. KORMAN,
Assistant to the Solicitor General.

MARCH 1974.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT,

v.

GEORGE J. WILSON, JR.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(District Court Criminal Action No. 71-587)

Argued September 17, 1973

Before: KALODNER, ALDISERT and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contention raised by appellant that the order of April 19, 1973, dismissing the indictment after trial and conviction is appealable and *United States v. Sisson*, 399 U.S. 267 (1970), and it appearing therefore that the district court's order is not appealable by the government under 18 U.S.C. § 3731, it is

ORDERED AND ADJUSTED that the appeal be and is hereby dismissed.

By the Court:

ALDISERT,
Circuit Judge.

Attest:

THOMAS F. QUINN,
Clerk.

Dated: September 21, 1973.

APPENDIX B

United States Court of Appeals for the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT,

v.

GEORGE J. WILSON, Jr.

Appeal from the United States District Court for the Eastern District of Pennsylvania

(District Court Criminal Action No. 71-587)

Present: KALODNER, ALDISERT and GARTH, *Circuit Judges.*

OPINION SUR PETITION FOR PANEL REHEARING

(Filed January 15, 1974)

ALDISERT, *Circuit Judge.*

We have before us a paper,[1] filed by the United States-appelant, which we shall treat as a petition for

[1] Federal Rule of Appellate Procedure 40(b) provides that the petition for rehearing shall be in the form prescribed by Rule 32(a). Rule 32(a) requires that the petition have a cover and that the title of the document appear thereon. Here there was neither a cover nor a title, and the paper was bound with masking tape. The paper which originally requested "rehearing or rehearing en banc" concludes: "It is, therefore, respectfully

rehearing, which seeks, inter alia, panel rehearing of an order entered on September 21, 1973, dismissing this appeal on the ground that the order of the district court was not appealable under 18 U.S.C. § 3731.

An indictment, returned on October 28, 1971, charging the defendant with violation of 29 U.S.C. § 501(c), embezzling funds of a labor organization, alleged that the defendant converted $1,233.15 of the monies of the International Brotherhood of Electrical Workers, Local 367, to use in paying for a portion of the expenses of his daughter's wedding reception at the Easton Hotel. Defendant, business manager of the Union, allegedly converted the money by way of a check signed by two officers of the Union, Robert Schaefer and Robert L. Brinker.

The F.B.I. began an investigation of this case and other cases involving the defendant in April of 1968, and continued it through June of 1970. The investigation concerning the subject of this indictment was completed by the F.B.I. by June of 1969, after which evaluations were made by the Organized Crime Strike Force and by the United States Attorney's Office. These evaluations resulted in a delay which caused the indictment to be returned October 28, 1971, three days prior to the running of the statute of limitations.

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submitted that the petition for rehearing *en banc* be granted or, the alternative that a writ of mandamus issue." We express no little distress that the United States Attorney and the "Department of Justice Office of the Solicitor General" not only have failed to respect the requirements of F.R.A.P. 40(b), but have attempted to combine, in one instrument, a petition for rehearing with an original petition for mandamus. Finding no authority for such a bizarre procedure, we expressly condemn such attempt. To the extent that the paper is designed to serve as a petition for mandamus, the prayer of the petition will be denied.

Prior to trial defendant filed a motion to dismiss the indictment on the basis of prosecutorial pre-indictment delay. Two pre-trial hearings were held, and the defendant established that the two signatories to the check were no longer available: Brinker had died, and Schaefer was terminally ill. The court denied defendant's motion, and the case proceeded to trial. After the jury returned a verdict of guilty, defendant filed motions for arrest of judgment, judgment of acquittal and a new trial. The district court ordered that the case be dismissed pursuant to F.R. Cr. P. 48(b) concluding that the prosecutorial pre-indictment delay had substantially prejudiced the defendant's right to a fair trial under the due process clause of the Fifth Amendment. *See, United States v. Marion*, 404 U.S. 307 (1971). The government appealed; we dismissed the appeal by judgment order.

In its "petition" the government argues that our dismissal of the appeal and our reliance on *United States v. Sisson*, 399 U.S. 267 (1970), overlook the clearly expressed intent of Congress to authorize an appeal from all post-conviction orders except where prohibited by the double jeopardy clause. We disagree.

After the Supreme Court's decision in *Sisson* Congress amended 18 U.S.C. § 3731.[2] That section presently provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

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[2] The new amendment applies only to criminal cases begun in any district court on or after its effective date, January 2, 1971. Here the indictment was returned on October 28, 1971.

This amended section does no more than establish the double jeopardy clause as the only bar to appeals by the United States from a dismissal of an indictment or information. However, it is well established that the double jeopardy clause bars an appeal by the government from an acquittal. *Price v. Georgia,* 398 U.S. 323, 327 (1970). Since we find that the legal effect of the district court's "dismissal" was a directed verdict of acquittal, the following language from *Sisson* remains applicable:

> Quite apart from the statute, it is, of course, well settled that an acquittal can "not be reviewed, on error or otherwise, without putting [the defendant] twice in jeopardy, and thereby violating the Constitution. . . . [I]n this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States v. Ball,* 163 U.S. 662, 671 (1896).

399 U.S. at 289–90. (Footnote omitted.) "[T]he trial judge's disposition is an 'acquittal' if it is 'a legal determination on the basis of facts adduced at the trial relating to the general issue of the case. . . .'" *United States v. Jorn,* 400 U.S. 470, 478 n.7 (1971). This necessarily requires a careful review of the entire record in each case.

While there may be occasions where an appeal may lie from a district court's dismissal of an indictment or information because further prosecution is not barred in the double jeopardy clause, we cannot agree that this is such a case. Here the record indicates that defendant filed post-trial motions for arrest of judgment, judgment of acquittal, and for a new trial. The district court, in reaching its legal determination, relied on facts adduced at trial relating to the general issue of the case.

> The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. . . . During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that he ordered no one to write the check in question (N.T. 164–165).
>
> On the [g]overnment's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). . . . Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant (N.T. 80, 181).
>
> . . . The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial.

The district court granted the relief sought, but labelled it as a dismissal of the indictment. However, we have been admonished to "be guided in determining the question of appealability . . . not by the . . . [label] the court gave [its decision] but by what in legal effect it actually was. . . ." *United States v. Sisson, supra,* at 279 n. 7.

The government argues that our dismissal of this appeal is in conflict with our holding in *United States v. Pecora,* — F.2d — (No. 72-2173, August 31, 1973) and the Seventh Circuit's recent case of *United States*

v. *Esposito*, F.2d (No. 72-1825, June 12, 1973). Although the court in *Esposito* held that the order of the district court was appealable under amended Section 3731, it stressed:

> For jeopardy purposes the question to be decided is whether the trial court "bottomed" his order "on factual conclusions not found in the indictment" or "on the basis of evidence adduced at trial." *United States v. Sisson*, 399 U.S. 267, 288 (1970). If the court's order "arresting judgment" is based upon evidence produced at trial, it is in the nature of an acquittal and is not appealable under the double jeopardy clause.
>
> A review of the record here shows that the trial judge did not base his order on the evidence adduced at trial.

(Slip opinion at 3.) Thus, the critical distinction between *Esposito* and the case *sub judice* is that here the district court did bottom its decision on evidence adduced at trial.

In *United States v. Pecora, supra*, we held that an order of the district court granting defendant's motion to dismiss based upon stipulated facts for the purpose only of attacking the validity of an indictment was appealable. There we emphasized that "[e]ntering into the stipulation of facts for the purpose only of attacking the validity of the indictment did not constitute the waiver [of defendant's right to a jury trial] . . ." and that "[t]he district court . . . [did not determine] the character of . . . evidence [actually entered into the record]. . . ."

Under the totality of the circumstances of this case, considering that defendant filed pre-trial motions to dismiss, that following two pre-trial hearings the motions to dismiss the indictment were denied, that he was forced to defend the indictment after a jury had

been impaneled and sworn, and that the "dismissal" was entered following post-trial motions for judgment of acquittal or arrest of judgment after the district court based its legal determination on facts adduced at trial relating to the general issue of the case, we cannot say that its dismissal did not operate as an acquittal.

Accordingly, the "petition" for panel rehearing will be denied.

APPENDIX C

United States Court of Appeals For the Third Circuit

No. 73-1444

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGE J. WILSON, JR.

Present: SEITZ, *Chief Judge,* and KALODNER, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEISS, and GARTH, *Circuit Judges.*

ORDER

Appellant's petition for rehearing having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. The petition for writ of mandamus to compel the district court to vacate the order of dismissal and enter a judgment of conviction is denied.

Judge Rosenn would grant the petition for rehearing.

By the Court:

ALDISERT, *Circuit Judge.*

Dated: January 15, 1974.

A True Copy:

Teste:

_____,

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX D

Crim. A. No. 71-587.

UNITED STATES OF AMERICA

v.

GEORGE J. WILSON, JR.

United States District Court for the Eastern District of Pennsylvania

April 18, 1973

MEMORANDUM AND ORDER

JOHN MORGAN DAVIS, *District Judge.*

The defendant has petitioned this Court for consideration of a number of post-trial motions which include a motion for new trial, motion in arrest of judgment and motion for judgment of acquittal.

Before commencing a discussion of the issues at hand, the Court will relate a brief account of the facts. The indictment, returned on October 28, 1971, charged the defendant with a violation of 29 U.S.C. § 501(c) which is the embezzlement of funds of a labor organization. The defendant was found guilty by a jury on March 17, 1972, of converting $1,233.15 of the monies of Local No. 367 of the International Brotherhood of Electrical Workers of Easton, Pennsylvania (hereinafter I.B.E.W.) to use in paying for a portion of the expenses of his daughter's wedding reception at the Easton Motor Hotel. The manner in which the money was converted was by way of a check signed

by two officers of the Unions of which Mr. Wilson was Business Manager.

The F.B.I. began its investigation in April 1968 and continued through June 1970. However, the bulk of the F.B.I. examination was completed by June 1968. Following the investigation an evaluation was made by Organized Crime Strike Force of the Department of Justice and by the United States Attorney's Office. The evaluations resulted in a delay which caused the Indictment to be returned three days prior to the running of the Statute of Limitations.

The Court held a pretrial hearing on February 17, 1972, to hear argument on Motions to Inspect the Grand Jury Minutes; for a Preliminary Hearing; and to Dismiss the Indictment. All of the motions were denied. On March 14, 1972, a rehearing was held on the Motion to Dismiss. The Court after hearing the testimony of Mrs. Jean Sippel, the office secretary of the Union, and of George J. Wilson, the defendant (pretrial Notes of Testimony), denied the defendant's Motion to Dismiss.

The defendant presents to the Court six points in support of his Motion for a New Trial. The first point is whether the Court erred in denying Defendant's Motion to Dismiss. The defendant alleges that undue prejudice was caused by an unreasonable pre-indictment prosecutorial delay and is in violation of the Fifth and Sixth Amendments of the Constitution. The leading case on this point is United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.E.2d 468 (1971). In the *Marion* case, supra, the Supreme Court held that the Sixth Amendment right to a speedy trial does not apply until the defendant is actually indicted. Thus the entire basis for this Motion is whether the defendant's Fifth Amendment due process rights have been violated. The Court said at 324, 92 S.Ct. at 465:

> The Government concedes that the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial. . . . Cf. Brady v. Maryland, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963), Napue v. Illinois, 360 U.S. 264 [79 S.Ct. 1173, 3 L.Ed.2d 1217] (1959).

The Court did not elaborate on substantial prejudice but left this up to future cases.

The first element of a violation of due process is to determine whether there was unreasonable delay. In this case there was a delay of approximately 16 months from the time the investigation was complete to the time the indictment was returned. The Government claims the delay was in evaluating the case by the Organized Crime Strike Force and the Attorney General's Office. Unfortunately, this argument does not impress the Court, and the Court will follow Judge Newcomer's language in United States v. Wilson, Jr. et al., 346 F.Supp. 371, at 374 (E.D.Pa. 1972), when he said:

> It takes some time to transfer a file and bring an indictment, but in this case it shouldn't have taken seventeen months. The Court is of the opinion that there was an unreasonable delay in bringing the indictment in this case.

Thus this Court also finds unreasonable delay.

The Court must now deal with the problem of whether the defendant was substantially prejudiced by the unreasonable delay in bringing the indictment. Under the dictum of the *Marion* decision, supra, it is necessary for the defendant to show the unreasonable delay caused substantial prejudice, not merely speculative prejudice.

The defendant contends that there are two potential witnesses, a Mr. Brinker, Past Treasurer of

I.B.E.W. and a Mr. Schaefer, Past President of I.B.E.W. who were the co-signors of the check involved. It is contended that Mr. Brinker and Mr. Schaefer as co-signors could assist in Mr. Wilson's testimony and possibly explain away the circumstances of the check. Mr. Brinker died prior to 1970 and consequently his testimony would have no bearing on the question of prejudice during the period of unreasonable delay which commenced in late 1970.

However, the potential witness, Mr. Schaefer, who became terminally ill during the period of unreasonable delay, presents a different problem. The question that is presented to the court is whether there is substantial prejudice, if the government unreasonably delays in presenting an indictment and a potential witness becomes incapable of testifying during that period of unreasonable delay. This question differs from the *Wilson* case, supra, before Judge Newcomer because in that case there were other witnesses who could testify on the points which Mr. Brinker and Mr. Schaefer were knowledgeable. Here, the defendant contends that these two men were the only one's knowledgeable on the signing of the check and substantial prejudice resulted because Mr. Schaefer was unable to testify.

The Court takes notice of the facts brought out in the testimony of the case concerning the potential testimony of Mr. Schaefer. Mr. Wilson, the defendant, stated (40–41 of the Notes of Testimony of the pre-trial hearing held on March 14, 1972) that the signing of all union checks was in the hands of Mr. Brinker and Mr. Schaefer. During the trial (N.T. 133–134) the defendant indicated that he never involved himself with bookkeeping or the internal affairs of the office. Finally, Mr. Wilson stated that

he ordered no one to write the check in question. (N.T. 164–165).

On the Government's side, it was established that the bill from the wedding reception was sent to the defendant's home address and not to the union (N.T. 62). Also, Mrs. Jean Sippel, the office secretary for the I.B.E.W. and the individual who prepared the checks for the signature of Mr. Brinker and Mr. Schaefer stated that at no time had a check prepared by her been sent back without being signed. Other testimony established that Mr. Wilson controlled the union (N.T. 17), and that Mr. Schaefer and Mr. Brinker were office help who owed their jobs to the defendant. (N.T. 80,181).

Since both sides make opposite contentions about the potential testimony of Mr. Schaefer, the Court cannot make an adjudication of the veracity of the testimony. The Court finds that the unreasonable delay was substantially prejudicial to the case of Mr. Wilson in that the only witness who could explain the circumstances of the check became terminally ill during the period of unreasonable delay. Although the government contends that this is only a showing of potential or speculative prejudice, there is an absolute certainty as a signer of all checks that Mr. Schaefer would add testimony of utmost importance to the trial. Because of the unreasonable delay, substantial prejudice resulted which violated the defendant's due process rights under the Fifth Amendment.

The remaining points of the defendant's argument need not be ruled upon because the Court will dismiss the indictment on the basis that the defendant was substantially prejudiced prior to trial.

U.S. GOVERNMENT PRINTING OFFICE: 1974